IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :
THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE HARUN-UL-RASHID

THURSDAY, THE 2ND AUGUST 2007 / 11TH SRAVANA 1929

ST.Rev..No. 243 of 2003

TA.149/2003 OF THE KERALA SALES TAX APPELLATE TRIBUNAL, ADDITIONAL BENCH, KOZHIKODE
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REVISION PETITIONER/APPELLANT:

M/S. SANDHYA BAKERY,
S.M. ROAD, KANNUR.

BY ADV. SRI.RAJESH NAMBIAR

RESPONDENT/RESPONDENT;

THE STATE OF KERALA.

BY SR.GOVERNMENT PLEADER MR.MOHAMMED RAFIQ

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 02/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

H.L.DATTU, C.J. & HARUN-UL-RASHID, J.

S.T.Rev.No.243 of 2003

Dated, this the 2nd day of August, 2007

ORDER

H.L.Dattu, C.J.

Petitioner is a dealer registered under the provisions of the Kerala General Sales Tax Act, 1963, hereinafter referred to as 'the Act'.

(2) The assessing authority for the assessment year 1997-98 had completed the revised assessment by his order dated 6.3.2001. While computing the tax liability, the assessing authority has brought to tax the sale of the car effected by the assessee, though it was the specific contention of the assessee that he is a second dealer and not liable to pay tax. The assessing authority in his proposal/pre-assessment notice has stated as under:-

> "The assessee had sold a motor car during the year. The written down value of the vehicle as on 1.4.1997 was Rs.2.07,180.00. The profit on the sale of vehicle was Rs.52,820.00. Thus the sale value of the vehicle was Rs.2,60,000.00 (Rs.2,07,180 + Rs.52,820.00)."

(3) The assessing authority had also noticed the objections of the assessee in his assessment order. The main objection that was canvassed by the assessee in this regard was as under:

> "The purchase of the car was made from a person said to be the partner of various firms in Kannur. Since the purchase had been effected from a Kannur party, the sale of the car is not amounting the first sale in the hands of the Assessee and so the Assessee is not liable to pay tax on the sale of the car."

(4) After considering the objections so made by the assessee, the assessing authority has proceeded to pass the order as under:

> "The burden of proof to establish that the car had already suffered first point tax and now the sale in the hands of

> the Assessee is amounting only as IInd sale is entirely upon the Assessee. The Assessee had raised some arguments, but it is found to be not supported by any evidence. In the circumstances the objections raised by the Assessee is not found sustainable."

(5) After coming to the aforesaid conclusion the assessing authority had denied exemption to the assessee on the second sale of the car.

(6) Aggrieved by this portion of the order passed by the assessing authority, the assessee had carried the matter in appeal before the first appellate authority in S.T.A.No.549 of 2002. Before the first appellate authority the assessee had produced the assessment records of his vendor, namely M/s.Sannidhan Bar and Hotel. Even after perusal of the documentary evidence so produced, the appellate authority has still come to the conclusion that the assessee is not a second seller in the State of Kerala and accordingly confirmed the orders passed by the assessing authority. The order passed by the first appellate authority is as under:

> "I have considered the above contentions and also examined the connected records. The appellant has produced before me the assessment order passed by the Addl. Sales Tax Officer II, Commercial Taxes, III circle, Kannur in favour of M/s.Sannidhan Bar and Hotel. In the above assessment order the sales turnover of one car is seen assessed to tax. But the appellant has failed to prove that the car purchased and sold subsequently by him was that car and its sales turnover has been assessed to tax at the hands of the seller."

(7) Aggrieved by the said order of the appellate authority, the assessee had carried the matter by way of second appeal before the Tribunal in T.A.No.149 of 2003. The Tribunal has rejected the appeal by its order dated 28th May, 2003. The correctness or otherwise of the said order is the subject matter of this revision petition.

(8) In the memorandum of revision petition the assessee has framed

the following questions of law for our consideration and decision. They are as under:

> "I. Whether the order of the Sales Tax Appellate Tribunal is correct in law, facts and circumstances of the case?
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> II. The Sales Tax Appellate Tribunal in its order has held that in order to claim exemption under the Act as second seller the dealer has not only to prove that the sale was not first sale, he has to further prove that the seller has liability under the Act and paid tax. The said reasoning of the Appellate Tribunal is against the provisions of the Act and contrary to the principles and guidelines laid down by the Hon'ble Supreme Court and Hon'ble High Court of Kerala and other High Courts. Division Bench of the Madras High Court in State of Tamil Nadu vs. Chamundesswari Enterprises reported in 52 S.T.C. pg. 124 held that "the onus on the subsequent seller is only to point out that there has been a first sale and the onus is not on him to show that the first sale has in fact suffered tax". The said view has also been upheld by the Supreme Court in its decision reported in 93 S.T.C. pg.185 and also by another Division Bench of the Madras High Court in National Iron Traders Vs. State of Tamil Nadu, reported in (1997) 108 S.T.C.Pg.42. Full Bench of the Kerala High Court in its decision in Sree Krishna Trading Co Vs. State of Kerala has also held that if the dealer establishes that his purchase is from first seller who is liable to pay tax under the Act, he shall be absolved from payment of tax. Whether the finding of the Sales Tax Appellate Tribunal that the petitioner has to prove that the car purchased by him has suffered tax at the point of first sale in order to claim exemption as second sale is correct in law?
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> III. Annexure D and E agreements produced by the petitioner before the Tribunal is clear proof that the car purchased by him from one Mr.Sunil and the car sold by him are one and the same. It is also evident that the car was purchased locally. The value of the car was Rs.2,65,000/- which is above the taxable limit and thus the first seller was liable to pay tax. The said facts are not disputed by the Tribunal. The stand of the Tribunal that there is nothing in the agreement to show that Mr.Sunil is the managing Partner of M/s.Sannidhan Bar and Hotel and nothing to show that the vehicle was owned by M/s.Sannidhan Bar and Hotel is totally irrelevant. The Tribunal has ignored the fact that the first seller is clearly identified and it is totally irrelevant whether the first seller is the managing partner of a firm or not in order for the petitioner to claim exemption as second seller.

> Whether the order of the Tribunal passed by ignoring relevant facts and relying on irrelevant facts is sustainable in law?
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> IV. The petitioner had satisfied the burden of proof. The burden of proof on the petitioner is to show that there had been a first sale and that the first seller is liable to pay tax. The petitioner has discharged the said burden of proof. Whether the Tribunal was correct in law in stating that the petitioner has failed to discharge his burden?"

(9) Under Section 12 of the Act the burden of proof is on the assessee. The said provision is as under:

> "**12. Burden of proof:-** (1) The burden of proving that any transaction of a dealer is not liable to tax under this Act shall lie on such dealer."

(10) The burden of proving that any transaction of a dealer is not liable to tax under the Act is mainly on the dealer who claims such exemption.

(11) For the purpose of disposal of this revision petition we need not to have notice the Rules made for the purpose of Section 12 of the Act.

(12) The facts are not in dispute. The assessee has sold a car. According to him he is a second seller. He has also stated that he had purchased the car from M/s.Sannidhan Bar and Hotel.

(13) Before the first appellate authority, the assessee had produced the assessment orders passed in the case of M/s.Sannidhan Bar and Hotel. In the said assessment order the sales turnover of one car was assessed to tax. That only means that M/s.Sannidhan Bar and Hotel had suffered the tax for the sale of the car effected by them in favour of the assessee.

(14) If that position is accepted, it would only mean that the assessee when he sold the car, he is a second seller, and if it is so, he is not liable to pay any tax under the Act.

(15) In that view of the matter, the questions of law raised by the assessee require to be answered in his favour and against the Revenue.

Consequently, I.A.No.1706 of 2003 is dismissed.

Ordered accordingly.

(**H.L.DATTU)**
CHIEF JUSTICE

(HARUN-UL-RASHID)
JUDGE

vns/dk